1993

# Bailey-Allen Company, Inc. v. Stanley M. Kurzet, an individual; Stanley M. Kurzet and Anne L. Kurzet, as Trustees for The Kurzet Family Trust; The Kurzet Family Trust; and John Does 1 through 10 : Brief of Appellant

Utah Court of Appeals


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IN THE UTAH COURT OF APPEALS

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| BAILEY-ALLEN COMPANY, INC., Plaintiff and Appellee, vs. STANLEY M. KURZET, an individual; STANLEY M. KURZET and ANNE L. KURZET, as Trustees for THE KURZET FAMILY TRUST; THE KURZET FAMILY TRUST; and John Does 1 through 10, Defendants and Appellants. | BRIEF OF APPELLANT<br>Case No. 930178<br>Priority 15 |

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**APPEAL FROM THIRD JUDICIAL DISTRICT COURT**
**OF SUMMIT COUNTY, STATE OF UTAH**
**HON. HOMER WILKINSON PRESIDING**

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IN THE UTAH COURT OF APPEALS

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| vs. | ) | |
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## I. PARTIES

All parties to this appeal are listed in the caption on the cover of this Brief.

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## III. TABLE OF AUTHORITIES

## IV. JURISDICTION

The Utah Court of Appeals has jurisdiction of this matter pursuant to Utah Code Ann. § 78-2a-(2)(k) (1953, as amended).

## V. STATEMENT OF THE ISSUES

A. Whether Appellee, who materially breached a contractual duty to direct and supervise the construction of Appellants' residence, is entitled to damages under the construction contract establishing such duty and setting the amount of compensation for discharging such duty.

The issue raises a question of law and the Court of Appeals should review the trial court's decision for "correctness" without giving deference to the trial court's view of the law. Van Dyke v. Chappell, 818 P.2d 1023, 1024 (Utah 1991); Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989).

B. Whether Appellee, who breached the contract and was justifiably discharged from the job, is entitled to maintain an action against the non-breaching Appellant under a theory of unjust enrichment to recover amounts he would have been entitled to under the contract had he not breached or had he been unjustifiably discharged.

The issue raises a question of law and the Court of Appeals should review the trial court's decision for "correctness" without giving deference to the trial court's view of the law. Van Dyke v.

Chappell, 818 P.2d 1023, 1024 (Utah 1991); Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989).

C. Whether prejudgment interest is recoverable on an unliquidated award under a theory of quantum meruit or unjust enrichment.

The issue raises a question of law and the Court of Appeals should review the trial court's decision for "correctness" without giving deference to the trial court's view of the law. Van Dyke v. Chappell, 818 P.2d 1023, 1024 (Utah 1991); Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989).

D. Whether post-judgment interest runs from the date judgment was entered or from the date the trial court granted Appellee's Motion to Compel Filing of Findings, Conclusions and Judgment.

The issue raises a question of law and the Court of Appeals should review the trial court's decision for "correctness" without giving deference to the trial court's view of the law. Van Dyke v. Chappell, 818 P.2d 1023, 1024 (Utah 1991); Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989).

E. Whether the trial court erred in denying Appellants their attorney fees incurred in bringing a successful motion to dismiss Appellee's cause of action to enforce the mechanic's lien and cause of action for failure to obtain a construction bond.

The issue raises a question of law and the Court of Appeals should review the trial court's decision for "correctness" without giving deference to the trial court's view of the law. Van Dyke v. Chappell, 818 P.2d 1023, 1024 (Utah 1991); Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989).

## VI. DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Rule of Civil Procedure 54(e)(1992);

Utah Rule of Appellate Procedure 32 (1992);

Utah Code Ann. § 38-1-18 (1992);

Utah Code Ann. § 14-2-2 (1992).

The foregoing provisions are set forth in full in the Addendum hereto.

## VII. STATEMENT OF THE CASE

This is an appeal taken from the Third Judicial District Court of Summit County, State of Utah, the Honorable Homer F. Wilkinson presiding. The procedural history of the case is as follows:

1. On or about December 5, 1990, Appellee Bailey-Allen Construction Company, Inc.[1] filed a Complaint seeking to recover payment for services he alleged to have rendered in contracting and constructing Appellants' residence in Park City, Utah. (R. 002).

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[1] For convenience, "Appellee" is used in this Brief to designate Bailey-Allen Construction Company, Inc. and Richard Allen, its president and the individual involved in this dispute.

The Complaint alleged causes of action for Breach of Contract, Mechanic's Lien, Unjust Enrichment, and No Construction Bond. (R. 001-008).

2. On or about May 20, 1991, Appellants filed a Motion for Partial Summary Judgment on Appellee's Second Cause of Action (Mechanic's Lien), Third Cause of Action (Unjust Enrichment), and Fourth Cause of Action (No Construction Bond). (R. 062-064).

3. On August 26, 1991, after hearing oral argument on Appellants' Motion for Partial Summary Judgment as to the Second, Third and Fourth Causes of Action, the trial court entered a Minute Entry granting Appellants' Motion for Partial Summary Judgment on all three causes of action. (R. 106).

4. On September 12, 1991, Appellants' attorney filed an Affidavit of Attorneys' Fees and Costs, itemizing the attorney fees involved in bringing Appellants' Motion for Partial Summary Judgment. (R. 111-114). At the same time, Appellants submitted to the trial court a draft Judgment proposing to dismiss the three causes of action on which the trial court granted summary judgment and to grant Appellants their attorney fees and costs incurred in bring the Motion. (R. 110; 125-26).

5. On September 16, 1991, Appellee filed an Objection to Proposed Judgment in which Appellee objected to the amount of attorney fees requested by Appellants. (R. 116-17).

6. Appellants submitted a Response to [Appellee's] Objection to Proposed Judgment on September 18, 1991 (R. 122-23), contending that an award of fees and costs were proper under the Mechanic's Lien Statute, Utah Code Ann. § 38-1-18, and the Bond Statute, Utah Code Ann. § 14-2-2, and that the amount requested was reasonable since most of counsel's time on the Motion for Partial Summary Judgment was spent on those causes of action. (R.123).

7. On September 24, 1991, the trial court granted summary judgment on Appellee's claims for Unjust Enrichment, Mechanic's Lien and Construction Bond, and ordered that the mechanic's lien be discharged. (R. 127-28). The court reserved Appellants' request for attorneys' fees and costs under the Mechanic's Lien statute for future determination. (R. 128).

8. Appellee's remaining cause of action for breach of contract was tried to the bench on December 18 and 19, 1991 and on January 30, 1992. (R. 305).

9. During the trial, the court stated that it had erred in dismissing the cause of action for unjust enrichment and it reinstated the cause of action sua sponte over Appellants' objection. (R. 543-45).

10. At the conclusion of the trial, the court issued its ruling from the bench, awarding Appellee damages and directing Appellants to submit Findings of Fact, Conclusions of Law and Judgment. (R. 806).

11. On or about March 12, 1992, Appellee filed a Motion to Compel Filing of Findings, Conclusions and Judgment. (R. 171). Appellants' counsel advised the court that it had not yet received the transcript of trial and could not prepare the findings, conclusions and judgment without the transcripts. (R. 178).

12. Appellee's Motion to Compel Filing of Findings, Conclusions and Judgment was granted on April 17, 1992. (R.182).

13. Appellants filed a Notice of Substitution of Counsel on May 20, 1992, (R. 184A), and submitted proposed findings, conclusions and judgment on or about May 27, 1992. (R. 187).

14. Appellee filed Objections to the Proposed Findings, Conclusion and Judgment on July 6, 1992 (R. 204), and a hearing was held on August 28, 1992, on Appellee's Objections. (R. 213). The court entered judgment on October 7, 1992. (R. 220).

15. On October 19, 1992, Appellants filed a Motion to Alter or Amend the Judgment pursuant to Rule 59(e) of the Utah Rules of Civil Procedure. (R. 266).

16. On November 24, 1992, Appellee served a Writ of Execution on Appellant. (R. 272).

17. On December 8, 1992, upon a joint motion of Appellee and Appellant, the court issued an order staying execution of the judgment, authorizing Appellant to pay the judgment into court, and determining that said payment was adequate security of Appellee

pending the determination of Appellant's Motion to Alter or Amend the Judgment and pending the appeal of this matter. (R. 279).

18. Appellants' Motion to Alter or Amend the Judgment was denied on January 14, 1993. (R. 288).

19. Appellants filed a Notice of Appeal on February 12, 1993. (R. 294).

## VIII. STATEMENT OF RELEVANT FACTS

Except where noted, the following Statement of Relevant Facts is taken from the Findings of Fact and Conclusions of Law adopted by the trial court. See Addendum A. Appellants do not dispute the Findings of Fact, but they do contend that the trial court erred in its Conclusions of Law.

On or about July 3, 1990, Appellants and Appellee entered into a contract whereby Appellee agreed to act as the general contractor and to oversee the construction of Appellant's residence in Park City, Utah. (R. 214-15). The contract provided, among other things, that Appellee would provide evidence of adequate insurance coverage for the construction project, that he would act as the general contractor, and that he would supervise and direct the construction. (R. 214-15). In return, Appellants agreed to pay all costs of labor and material including $22 per hour for Appellee's own hands-on labor, and pay Appellee $100,000 for directing and supervising the construction. Id.

At the time the contract was signed, Appellee represented to Appellant that he had $1,000,000 in liability insurance in force. (R. 215). He failed, however, to provide evidence of such insurance as required by the contract. Id. Appellee later discovered that his policy was for only $300,000 coverage and that it had been cancelled on October 24, 1989, nearly two years before the Appellant and Appellee entered into the contract. (R. 215-16). Appellants notified Appellee on July 20, 1990 that Appellee had not yet provided the necessary certificate evidencing insurance coverage and that Appellants required such evidence under the terms of the contract. (R. 216). As of October 2, 1990, Appellee still had not provided a certificate of insurance. (R. 348-50, Testimony of Appellee, Richard Allen).

At the time Appellee entered into the contract, he was aware that Appellants had experienced problems with prior general contractors and had terminated two general contractors for unsatisfactory performance. (R. 215). Appellee was also aware that Appellants were meticulous and demanding individuals and would require exacting performance of the contract. Id.

On or about October 2, 1990, Appellants terminated Appellee from the construction project for Appellee's failure to obtain insurance as required by the contract, and his failure to adequately direct and supervise the construction. (R. 216). Appellee filed a mechanic's lien, brought an action to foreclose the lien

and an action for failure to obtain a construction bond, and sought to recover damages under the contract and under a theory of unjust enrichment for the $100,000 fee for directing and supervising the construction. (R. 001-008, Complaint).

On September 24, 1991, the trial court granted summary judgment on Appellee's claims for Unjust Enrichment, Mechanic's Lien and Construction Bond, and ordered that the mechanic's lien be discharged. (R. 127-28, Order of Partial Summary Judgment).

The contract claim was tried to the bench on December 18 and 19, 1991 and on January 30, 1992. (R. 305, Reporter's Transcript of Trial Proceedings ("Trial Transcript")). During the trial, the court, sua sponte, reinstated the cause of action for Unjust Enrichment over Appellants' objection. (R. 543-45, Trial Transcript).

At the conclusion of the trial, the court issued its ruling from the bench. (R. 797-806, Trial Transcript). Pursuant to the court's instructions, Appellants' submitted Proposed Findings of Fact and Conclusions of Law (hereinafter "Proposed Findings and Conclusions" (R. 187-92), and a Proposed Judgment based on the court's verbal ruling. (R. 193-94). Appellee filed an Objection to Appellants' Proposed Findings and Conclusions (R. 204-07), and on August 28, 1992, a hearing was held on Appellee's Objections to the Proposed Findings and Conclusions (R. 213).

On October 7, 1992, the trial court adopted Findings of Fact and Conclusions of Law and entered Judgment. (R. 214-22). The court determined that a written contract existed between Appellee and Appellants; that although the written contract was ambiguous and incomplete as drafted, it could be interpreted as written; and that the court would look on it as an oral contract. (R. 217).

The trial court found that, under the contract, Appellee had a duty to promptly provide evidence of adequate liability insurance, but did not. (R. 217). The court concluded that Appellee's failure to provide evidence of adequate insurance was a material breach of the contract and that Appellants were justified in terminating Appellee's services for that breach. Id.

The trial court also found that Appellee failed to meet his obligation to oversee the construction. (R. 217). The trial court concluded that Appellants were justified in terminating Appellee from the job because Appellee did not give the construction project the kind of attention Appellee knew it would require under the contract. (R. 217).

The trial court concluded that Appellants were not in breach of the contract in any way. (R. 218). Nevertheless, the court awarded Appellee damages "in quantum meruit/unjust enrichment,

based on the contract..."[2] (R. 218). It found that about 10% of the construction project had been completed while Appellee was general contractor. (R. 216). Based on that percentage, the court determined that Appellants had received a benefit from Appellee's pre-termination services in the amount of $10,000 "regardless of whether [Appellee] performed its duties under the contract." (R. 216).

The trial court concluded that Appellee was entitled to receive $15,500 from defendant Appellants, "$10,000 representing 1/10 of the contract price of $100,000 for services in completing 1/10 of the construction, and $5,500 for services involving negotiations for the purchase of lumber." (R. 218). After calculating offsets for amounts owed by Appellee to Appellant for faulty construction of a retaining wall and staircase, and for unnecessary materials, the net judgment against Appellants, before interest, was $11,141.00. (R. 218-19).

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[2] For the purposes of this Brief "unjust enrichment" and "quantum meruit" are used interchangeably. Under Utah law, "quasi-contract" or "unjust enrichment" is the branch of "quantum meruit" allowing a contract to be implied in law and permitting a legal action in restitution. Davies v. Olsen, 746 P.2d 264, 269 (Utah App. 1987). Quantum meruit encompasses unjust enrichment. In the present case, there seems to be no reason for any distinction between the phrases.

Also, for the sake of simplicity, the term "damages" is used in this Brief to mean the award of money to Appellee (exclusive of interest and offsets) regardless of whether such amount was awarded pursuant to the contract or under a theory of unjust enrichment.

Pre-judgment interest was awarded at the rate of ten percent (10%) per annum, from November 1, 1990, the date Appellants terminated Appellee's services, to April 17, 1992, the date the trial court granted Appellee's Motion to Compel Filing of Findings, Conclusions and Judgment. (R. 219).

The court assessed post-judgment interest at the rate of twelve percent (12%) per annum, from and after April 17, 1992, the date the trial court granted Appellee's Motion to Compel Filing of Findings, Conclusions and Judgment. (R. 219). Judgment was entered October 7, 1992. Id.

On October 19, 1992, Appellants filed a Motion to Alter or Amend the Judgment pursuant to Rule 59(e) of the Utah Rules of Civil Procedure. (R. 266). Appellants moved the court to vacate the award of damages and interest, and to grant Appellants their attorney fees and costs incurred in bringing their successful motion for summary judgment on Appellee's cause of action to foreclose the mechanic's lien. Id. The Motion to Alter or Amend the Judgment was denied on January 13, 1993. (R. 288).

## IX. SUMMARY OF ARGUMENT

Appellee was not entitled to damages under the contract because he failed to perform under the contract. Under Utah law, in order to recover on a contract, "a contractor must first establish his own performance." Nielsen v. Wang, 613 P.2d 512, 514 (Utah 1980). In the present case, the trial court specifically found that Appellee did not perform under the provision of contract requiring him to direct and supervise the construction. (R. 217). Because Appellee failed to perform the duties on which payment was contingent, the court's ruling was error insofar as it was based on the contract.

Similarly, the court erred in awarding Appellee any recovery on its claim for unjust enrichment. Under Utah law, with only very few exceptions that are not applicable here, an award for unjust enrichment is prohibited when an enforceable contract exists. Karapanos v. Boardwalk Fries, Inc., 837 P.2d 576, 578 (Utah App. 1992); Davies v. Olsen, 746 P.2d 264, 268 (Utah App. 1987). Moreover, it was inappropriate for the court to conclude that Appellee conferred any benefit on Appellants. While 10% of the construction may have been completed during the period of time that Appellee was general contractor, Appellee did not cause that construction to be completed. In fact, the court found that Appellee failed to perform his duty in supervising the construction. Because Utah law forbids recovery in quantum meruit when a

valid contract exists, and in view of the court's ruling that Appellee failed to properly perform his duties as general contractor, it was error to award Appellee anything under a theory of unjust enrichment.

Assuming, arguendo, that an award of damages was proper, the trial court erred in awarding Appellee prejudgment interest. Prejudgment interest is warranted only when the amount of damages is certain from the time of loss. Shoreline Development, Inc. v. Utah County, 835 P.2d 207, 211 (Utah App. May 19, 1992). In equity cases, prejudgment interest is generally not available because the amount of damages cannot be calculated with any certainty. Id. (citing Bellon v. Malnar, 808 P.2d 1089, 1097 (Utah 1991)). In the present case, the amount the court awarded was unliquidated at the time of loss. (R. 128). It was error, therefore, to award prejudgment interest.

Assuming, arguendo, that an award of damages was appropriate, the trial court also erred in awarding Appellee post-judgment interest from the date that it granted Appellee's Motion to Compel Filing of Findings of Fact and Conclusions of Law. Utah law clearly holds that post-judgment interest runs from the date judgment is entered. Utah R. of Civ. P. 54(e) (1992); Utah R. App. P. 32 (1993).

Finally, the trial court erred in failing to award Appellants their attorney fees and costs incurred in bringing their

Motion for Partial Summary Judgment on Appellee's causes of action based on the Mechanic's Lien Statute and on the Construction Bond Statute. The provision at Utah Code Ann. § 38-1-18 mandates that the successful party be awarded its reasonable attorney fees in an action to foreclose a mechanic's lien. The court has discretion to award reasonable attorney fees to the prevailing party in an action for failure to obtain a construction bond. Utah Code Ann. § 14-2-2(3). In the present case, Appellants' timely and properly requested such fees and costs. The trial court failed to determine the proper amount of fees and failed to award fees to Appellants for prevailing on their Motion for Partial Summary Judgment with respect to the Second and Fourth Causes of Action.

Appellants, therefore, petition this Court to vacate the award of damages to Appellee, vacate the award of prejudgment and post-judgment interest, and to remand the case to the trial court with instructions to award Appellants their attorney fees and costs incurred in successfully pursuing their Motion for Partial Summary Judgment.

## X. ARGUMENT

### A. THE COURT SHOULD VACATE THE AWARD OF DAMAGES TO APPELLEE.

The trial court misapplied the law when it awarded Appellee damages and interest. A valid, enforceable contract existed, and because Appellee breached the contract, it was improper to award Appellee damages under the contract. The relationship of the parties was governed by the contract, and it was, therefore, improper to grant relief under a theory of unjust enrichment. There was simply no legal basis for the trial court's decision in this case.

#### 1. The Trial Court's Award of Damages to Appellee Was Improperly Based on Both the Contract and on a Theory of Unjust Enrichment.

The trial court's error in awarding damages stemmed from its finding that Appellee was in material breach of the contract while, at the same time, allowing Appellee to recover the amount that he would have been entitled to under the contract had he not breached. Because the court found that Appellee breached the contract and Appellant did not, it was left without a basis for an award of damages on the contract. The trial court, thus, awarded money to Appellee "based on the contract" and on a cause of action for unjust enrichment that the court had dismissed and then reinstated on its own initiative. (R. 218; 543-44). The resulting decision was a cryptic blend of legal theories.

Ruling from the bench, the court unequivocally found that Appellee had breached the contract. It stated:

> [Appellant's] testimony was that the contract was terminated because of the insurance. I think it is a major factor and I think he had the right to terminate the contract on that.
>
> . . . .
>
> And I think there were differences that began to arise as far as the attitude of being on the job, taking care of things right now, getting things done, seeing that they were done, seeing things were moving along, answering the questions, which the plaintiffs were not performing as far as the contract was concerned.
>
> Therefore the court does find that the plaintiff did breach the contract and that the defendant was justified in terminating the relationship, terminating the contract.

(R. 801). Having thus found, the court vaguely stated its reason for awarding damages:

> Now the question comes up as to unjust enrichment. . . . The court accepts the testimony of the architect and believes that . . . that is the best, most reliable testimony as far as the contract is concerned.
>
> And of course his testimony was that approximately 25% of the job was completed, 15% of it was completed at the time . . . when the plaintiff's commenced working and of course he said "less than 10%." Counsel did not tie him down to a figure; therefore, this court is going to accept the figure of 10% and find that . . . the plaintiffs are entitled to 10% of the amount of the contract.

(R. 801-03). This language suggests that the court awarded Appellee a recovery in unjust enrichment.

The trial court ordered that Appellant's prepare the findings of fact and conclusions of law and submit them to Appellee for approval. (R. 806). The trial court's imprecise ruling, however, created a problem as to whether the court had awarded Appellee damages under the contract or whether it had granted relief for unjust enrichment. Appellants' proposed Findings and Conclusions stated that the trial court had based the award on a theory of unjust enrichment. (R. 191). Appellee objected to the proposed finding limiting recovery to a quantum meruit theory of law. (R. 204). The parties presented oral argument on the proposed Findings of Fact and Conclusions of Law, and the trial court, again ruling from the bench, stated as follows:

> . . . the unjust enrichment, there is no question that this was a case based on the contract, that there was unjust enrichment, but it was a contract, which they entered into, which was not a complete contract, which this Court based an award on. So this is not only an unjust enrichment theory, it was also based on a contract which the parties had entered into.

(R. 213, Reporter's Partial Transcript of Hearing on Objections to Proposed Findings of Fact and Conclusions of Law and Judgment: Court's Ruling, at pp. 2-3).

In an attempt to articulate the trial court's ruling in writing, Appellee and Appellants' counsel finally agreed on the

following language which was incorporated into the Findings of Fact and Conclusions of Law:

> 8. The Court finds, that about 10% of the construction was completed while plaintiff was general contractor and, based on that percentage, defendants received a benefit from plaintiff's pre-termination services in the amount of $10,000 regardless of whether plaintiff performed its duties under the contract.

(R. 217, Findings of Fact)(emphasis added).

> 4. The court concludes that plaintiff's failure to promptly provide evidence of adequate liability insurance was a material breach of the contract.
>
> . . . .
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> 6. The Court concludes that defendants were justified in terminating plaintiff's services because plaintiff spent very few hours on the job site and did not give the construction project the attention that it required under the contract and that plaintiff knew Mr. Kurzet would expect.
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> . . . .
>
> 8. With respect to Appellees' Unjust Enrichment Claim, the Court has considered several alternative methods of calculating any award to Appellee under such a theory. The Court concludes the most logical basis to be the percentage of Appellants' residence that was completed during the period Appellee was on the job.
>
> . . . .
>
> 10. The Court concludes that Appellee is entitled to receive $15,500 from defendant in quantum meruit/unjust enrichment, based on the contract between Appellee and Appellants, $10,000 representing 1/10th of the contract price of $100,000 for services in completing 1/10th of the construction and $5,500 for services involving negotiations for the purchase of lumber.

(R. 214, 218). Based on the foregoing, the trial court awarded $15,500 in damages to Appellee less offsets for repairs to the retaining wall and stairs and for unnecessary materials. (R. 218-19).

The parties had an enforceable contract and Appellee, not Appellants, materially breached the contract. Having breached the contract, Appellee was not entitled to damages based on the contract. And, because a valid contract existed, Appellee was not entitled to an award in quantum meruit or unjust enrichment. By relying on both the contract and on a theory of unjust enrichment, the trial court sowed seeds of confusion and error and, ultimately, reached the wrong result. As demonstrated below, there were no grounds, either under the contract or in quantum meruit, for an award to Appellee.

2. Appellee is Not Entitled to Damages On the Contract.

The trial court correctly found that Appellee breached the contract in two respects. First, Appellee failed to provide evidence of adequate insurance. The contract provided for it (R. 10), Appellant said he had $1 million in coverage when, in fact, he did not (R. 215-16). Even after Appellants notified Appellee of the deficiency, Appellee failed to obtain coverage and provide evidence thereof. (R. 800-01).

In addition to failing to provide adequate evidence of insurance, the trial court found that Appellee failed to spend adequate time on the project and failed to give the project the attention required to properly direct and supervise the construction. (R. 217). That finding was well supported by the record. Appellee was rarely on the construction site. Appellants' payment records showed that the time Appellee spent on hands-on labor over a period of more than two months, from July 9, 1990 through September 15, 1990, amounted to only 60.5 hours. (R. 81, 84).

The construction that Appellee did supervise was often substandard. Under his supervision, a retaining wall was built out of square with the house (R. 436), a flight of concrete stairs was improperly placed (R. 713-14), and unnecessary materials were ordered. (R. 219; 721). The cost of correcting those mistakes was found to be $1,800 for the wall, $2,000 for the stairs and $559 for the unnecessary materials. (R. 805; 218-19).

Appellee knew that Appellants would be very demanding and meticulous about the construction, and that they would require exacting performance of the contract. (R. 215). Yet, the court found that Appellee was "very flippant in his attitude as far as the job was concerned," and that his flippant attitude "was conveyed to the defendant throughout the course of this contract." (R. 799). Differences between Appellee and Appellants arose concerning Appellee's "attitude of being on the job," Appellee's

attention to "getting things done, . . . seeing things were moving along," and his availability to answer questions about the project. (R. 801). The trial court observed that, given the size of the project and the amount of compensation Appellee was to receive under the contract, the project deserved closer attention than the Appellee gave it. (R. 798). The court concluded that Appellee was "not performing as far as the contract was concerned." (R. 801).

"The rule in Utah is that to recover on a contract, a contractor must first establish his own performance [or] a valid excuse for his failure to perform." Nielsen v. Wang, 613 P.2d 512, 514 (Utah 1980). A breaching party cannot enforce a contract against a non-breaching party. Id.; see also, Liddle v. Petty, 816 P.2d 1066, 1068 (Mont. 1991)(if one contracting party materially breaches the contract the other is entitled to suspend his performance); Parsons Supply, Inc. v. Smith, 591 P.2d 821, 823 (Wash App. 1978)(a breaching party cannot demand performance from nonbreaching party).

Having breached the provision of the contract on which the $100,000 payment was contingent, Appellee was not entitled to enforce it against Appellants. For the same reason, contrary to the trial court's decision, Appellee was not entitled to recover under the contract $5,500 for "negotiating the purchase of lumber." (R. 218). Appellee testified at trial that shortly after he had begun his work as the contractor on the construction project, he

took an inventory of lumber that had been ordered by a previous contractor but had not yet been paid for by Appellants. (R. 748). Appellants had planned to pay $28,000 for the lumber. Id. Appellee testified that he recommended to Appellants that they pay only $22,500 for the lumber instead of $28,000, and that Appellants were ultimately successful in purchasing the lumber for the lower price, a savings of $5,500. (R. 748-49).

Under the contract, Appellee was required to "obtain competitive bids for services and materials." (R.010). Assuming there was any savings as a result of Appellee's negotiation,[3] Appellee was not entitled to compensation for having advised Appellants and saved them money on the purchase of lumber. That was merely one of the services Appellee was required to render under the contract. The fact that he may have performed some tasks in fulfillment of his supervisory duty does not excuse a material breach of that duty. Certainly, it does not entitle Appellee to receive in damages the amount that he saved Appellants in expenses when it was part of his job to purchase materials at an economic price.

The trial court erred in granting Appellee relief under the contract because, as the court determined, Appellee did not

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[3] The record contains no proof that such savings were realized. For the purposes of this Brief, however, Appellants assume that the savings occurred because the trial court so determined. (R. 216).

perform under the contract.[4] This Court, therefore, should vacate the award of damages insofar as it is based on the contract.

3. Appellee Is Not Entitled to Any Recovery On Its Claim for Unjust Enrichment.

Under Utah law, an award for unjust enrichment is inappropriate when an enforceable contract exists. See, Karapanos v. Boardwalk Fries, Inc., 837 P.2d 576, 578 (Utah App. 1992) (Appellee not entitled to recover franchising fee under theory of unjust enrichment when enforceable franchising agreement exists). The Utah Court of Appeals has stated that "[r]ecovery under quantum meruit presupposes that no enforceable written or oral contract exists." Davies v. Olsen, 746 P.2d 264, 268 (Utah App. 1987). The rationale for resorting to a quantum meruit theory is that there is no contract yet there is some benefit that has been

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[4] Assuming for the sake of argument that somehow plaintiff could have been entitled to enforce the contract despite the breach, the trial court still would have erred in awarding damages because Appellee didn't prove his damages. Under Utah law, if a plaintiff cannot prove the fact of damages with reasonable certainty, he is not entitled to any. Sawyers v. F.M.A. Leasing Co., 722 P.2d 773, 774 (Utah 1986). Atkin Wright & Miles v. Mountain States Telephone & Telegraph Co., 709 P.2d 330, 336 (Utah 1985) (standard of proof required for establishing the fact of damages is greater than that required for establishing the amount). The damages recoverable by a contractor under a construction contract are "the total amount promised for the project, less the reasonable costs of completing it." Holman v. Sorenson, 556 P.2d 499, 500 (Utah 1976). Appellants expended considerable sums to finish the job and to correct Appellee's unacceptable work after Appellee was terminated from his employment. Appellee failed to put on any evidence of the reasonable costs of completing the project and to prove the fact of damages with any reasonable degree of certainty.

conferred. Id. at 268. In the absence of an express contract, the theory allows a contract to be implied either in law or in fact. Id.

There are very few exceptions to the rule. When an express construction contract exists, Utah courts have suggested that recovery in quantum meruit is proper only under extraordinary circumstances. When the work performed is very different from the work described in the construction contract, it may become reasonable to imply a contract that covers the additional work. Under such circumstances, an award of recovery in quantum meruit may be appropriate. But see, Highland Construction Co. v. Union Pacific Railroad Co., 683 P.2d 1042, 1048 (Utah 1984) (Court denied recovery in quantum meruit because Appellee contractor failed to prove in what respects the work performed differed from the work contemplated by the contract). In the present case, Appellee has not claimed, nor does the evidence show that any of the work Appellee performed fell outside the scope of contract.

Quantum meruit may also be applicable when a contractor justifiably ceases work or is unjustifiably terminated. See, Davies, 683 P.2d at 1048 (dicta). In the present case, the trial court expressly determined that Appellant was justified in terminating Appellee. The instant case does not present a set of facts that would allow recovery in quantum meruit in the face of a valid contract.

Assuming for the sake of argument that, contrary to the trial court's ruling, no enforceable contract existed, it still would have been error to award Appellee anything in unjust enrichment. To recover in an action for unjust enrichment, plaintiff must demonstrate: (1) that defendant received a benefit; (2) appreciation or knowledge by the defendant of the benefit; (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it." Davies v. Olsen, 746 P.2d at 269. The measure of recovery is "the value of the benefit conferred." Id. The purpose of quantum meruit is "to prevent the defendant's enrichment at the plaintiff's expense." Id. (citations omitted). Of course, the theory presupposes that it was the plaintiff who conferred the benefit on the defendant.

In the present case, the trial court's rationale for awarding damages was that, because ten percent of the construction project was completed while Appellee was the general contractor, Appellants received a benefit from Appellee's pre-termination services "regardless of whether Appellee performed its duties under the contract." (R. 216). The ruling is self-contradictory. If Appellee didn't perform, then Appellee conferred no benefit.

The court relied on the testimony of an architectural draftsman to determine that 10% of the work was completed between early July and the end of September, the time period that Appellee was supposed to be acting as general contractor. (R. 803). In

focusing on the percentage that was completed, the court ignored the fact that Appellee was not responsible for completing it. The court stated:

> Now a lot is said that they [Appellee] should not be entitled even to that amount, because of their not being on the job and not answering the questions.
>
> And that might be, except for the fact that even if they were not there, and were not able to answer questions, the architect did testify that there had been 10% work accomplished, and therefore the defendant had been enriched by that amount.

(R. 803)(emphasis added). The court concluded that even if Appellee could not be credited with causing 10% of the construction to be completed, the very fact that it was completed entitled Appellee to 10% of the amount provided for in the contract. Appellants may have been enriched, but it was not unjustly. The record demonstrates that it was not Appellee who enriched them.

Appellee had a contractual duty to select bids for services and materials. (R. 010). Mr. Kurzet testified that, before Appellee was hired as the general contractor, Appellants had already selected a carpenter and contractor, Andrew Parker, to frame the house. (R. 599). Appellee was given the "option" to hire Mr. Parker as the framer, but if Appellee had not selected Parker, Appellants would not have hired Appellee. (R. 599-600). In other words, Appellee had to accept Appellants' choice of framers. Similarly, Appellee had no discretion in hiring the mason

who was selected solely by Appellants. (R. 601). After Appellee was terminated from the job, Mr. Parker continued to work on the project as the general contractor and was still employed by Appellants at the time this matter was tried. (R. 598-601).

The testimony at trial suggested that Appellee was only minimally instrumental, not only in selecting the subcontractors, but in supervising the project. Architectural draftsman, Stanley Johnson, testified that he was involved in the design, drafting and construction of Appellants' residence and, as part of his responsibilities in that regard, made periodic inspections of the structure and met with the workmen. (R. 666, 671). Mr. Johnson met with Mr. Parker and the mason on a regular basis, at least once or twice a week from July through September. (R. 676). During the same period of time, he met with Appellee between four and ten times. Id. Moreover, Mr. Johnson testified that the progress that occurred on the structure during that time period consisted of building the stone chimneys and framing the first three floors, accomplishments of the framer and mason. (R. 677).

Mr. Kurzet testified that Mr. Parker was responsible for working out design changes with the architect and for avoiding delays in the construction due to such changes. (R. 513). Although Mr. Parker tried to keep Appellee apprised of the process, Appellee was not present on a day-to-day basis and it was Mr. Parker who "grabbed the ball and ran with it." Id. Mr. Parker

testified that almost every afternoon after work he went to the architect's office to discuss problems that had arisen with the construction. (R. 700). Appellee was not present at any of those meetings between Mr. Parker and the architect (R. 700-01), and Mr. Parker estimated that Appellee was seldom at the job site for more than about one half hour each day. (R. 695). In fact, Mr. Parker testified that had Appellee never been present at all, the framing would have been accomplished and the rate of construction would not have slowed. (R. 710).

The record in this case shows that Appellee did little to contribute toward the progress in the construction of Appellants' residence that took place between July and September of 1990. Appellee was fairly paid for the work that he did; every invoice that Appellee submitted to Appellants was paid, including those for Appellee's own labor. (R. 93, Affidavit of Richard Allen; R. 81-85, Exhibit to Affidavit of Stanley M. Kurzet (showing itemization of labor costs paid)). If ten percent of the construction was completed during that period, it was not due to Appellee's services, but to the efforts of others. Even the trial court seems to have recognized that Appellants were not unjustly enriched by Appellee when it ruled that Appellee did not give the project the attention it deserved.

The award of unjust enrichment should be vacated because such an award is not allowed under Utah law when there is a valid

contract, and because Appellee's services were not of significant benefit to Appellants.

### B. THE COURT SHOULD VACATE THE AWARD TO APPELLEE OF PREJUDGMENT INTEREST.

In its Findings of Fact and Conclusions of Law, the trial court concluded that Appellee was entitled to prejudgment interest at the rate of 10% per annum from the date Appellants terminated Appellee's services to April 17, 1992, the date the trial court granted Appellee's Motion to Compel Filing of Findings, Conclusions and Judgment. The award of prejudgment interest is error and should be vacated.

An award of prejudgment interest on an unjust enrichment award is contrary to law. Under Utah law, an award of prejudgment interest is warranted only when the amount of damages is certain from the time of loss. Shoreline Development, Inc. v. Utah County, 835 P.2d 207, 211 (Utah App. May 19, 1992). The Utah Supreme Court has stated that where damages cannot be calculated with mathematical accuracy, prejudgment interest is not recoverable. Bjork v. April Indus., Inc., 560 P.2d 315, 317 (Utah 1977), cert. denied 431 U.S. 930, 97 S.Ct. 2634, 53 L.Ed.2d 245. In order for damages to mathematically certain, they must be ascertained

> in accordance with the fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements

> that cannot be measured by any fixed standard of value.

Price-Orem v. Rollins, Brown & Gunnell, 784 P.2d 475, 483 (Utah App. 1989) (quoting Fell v. Union Pacific Railroad Company, 32 Utah 101, 88 P. 1003, 1005 (1907)).

In equity cases, damages often cannot be calculated with mathematical certainty, thus prejudgment interest on an award in equity is generally not allowed under Utah law. In Shoreline Development, the plaintiff appealed a denial of prejudgment interest on an unjust enrichment award. The plaintiff contended that because an unjust enrichment claim is similar to a contract claim, prejudgment interest should have been awarded. The Court of Appeals observed that the determining factor in awarding prejudgment interest is not the nature of the claim; it is "whether the damages upon which prejudgment interest is sought can be calculated with mathematical certainty." Id. at 211.[5] The Court noted that,

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[5] There are numerous cases in support of this proposition. E.g. Jack B. Parson Constr. Co. v. State, 552 P.2d 107, 108-09 (Utah 1976) (amount due under the contract was ascertainable by calculation); Smith v. Linmar Energy Corp., 790 P.2d 1222, 1225 (Utah Adv. 1990) ("A court can award pre-judgment interest only when the loss is fixed at a particular time and the amount can be fixed with accuracy."); Bjork v. April Indus., Inc., 560 P.2d 315, 317 (Utah) cert. denied, 431 U.S. 930, 97 S. Ct. 2634 (1977) (where damages cannot be calculated with mathematical accuracy the amount of the damage must be ascertained and assessed by the trier of fact and pre-judgment interest is not allowed); Fell v. Union Pacific Ry. Co., 32 Utah 101, 88 P. 1003, 1006 (1907) ("in all . . . cases where the damages are incomplete and are peculiarly within the province of the jury to assess at the time of trial, no interest is permissible.").

because an award in equity is based on the amount by which one is unjustly enriched, it is less likely to admit of mathematical certainty. Prejudgment interest, therefore, is generally precluded in equity claims. Id. (citing Bellon v. Malnar, 808 P.2d 1089, 1097 (Utah 1991)).

Even though prejudgment interest is generally not recoverable in an equity claim, a plaintiff is not denied an remedy. A plaintiff may claim lost interest as part of damages. Shoreline Development, at 29 (citing Uintah Pipeline Corp. v. White Superior Co., 546 P.2d 885, 887 (Utah 1976). The Court clearly articulated the rule: "[P]rejudgment interest must be sought directly as damages in unjust enrichment cases, if at all." Id. (emphasis added).

In the present case, the trial court stated that it based the amount on the contract. But the underlying rationale for the award of damages was the unsupported conclusion that Appellants received a benefit from Appellee's services. The trial court found that "approximately" ten percent of the work had been completed based on the architect's testimony of "less than ten percent," although the court noted that "counsel did not tie him down to a figure." (R. 803).

There was no argument nor even any suggestion by either party that the amount of the award was ascertainable from the time of the alleged loss. In fact, the trial court had already ruled

that the amount was not ascertainable. (R. 299, Reporter's Transcript of Defendant's Motion for Partial Summary Judgment and Scheduling Conference at pp. 12-15). Part of the basis for the court's granting Appellants' Motion for Partial Summary Judgment on the Mechanic's Lien cause of action was that the sum that Appellee claimed was owed him for supervisory services was unliquidated. Id. The court found that Appellee "had no right to file a mechanic's lien against [Appellants'] property for an unliquidated sum." (R. 128, Order of Partial Summary Judgment).

As discussed above, the amount of damages in this case was determined by approximating the value of the construction that was completed while Appellee was the general contractor. The amount of unjust enrichment could not have been calculated with mathematical certainty, either at the time of loss or at the moment of judgment because it depended on the trial court's sense of equity in compensating for a benefit supposedly conferred. Prejudgment interest is contrary to law and the award should be vacated.

### C. THE COURT SHOULD VACATE THE AWARD OF POST-JUDGMENT INTEREST.

The Court should amend the judgment to vacate the award of post-judgment interest because, as discussed above, Appellee is not entitled to recovery either under the contract or, under a theory of unjust enrichment. Assuming, arguendo, that an award of

post-judgment interest had been appropriate, post-judgment interest should run from the date judgment was entered. Utah R. Civ. P. 54(e); see also, Utah R. App. P. 32 (1993) ("Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the trial court")(emphasis added).

The trial court awarded post-judgment interest on $11,141 at the rate of 12% per annum from and after April 17, 1992. (R. 219). The court reasoned that because Appellee prevailed on its Motion to Compel Filing of Findings, Conclusions and Judgment, Appellee should recover post-judgment interest from the date the trial court granted the Motion. Presumably, the trial court meant to penalize Appellants for delaying the date that judgment was finally entered.[6]

Rule 54(e) of the Utah Rules of Civil Procedure provides that interest on a judgment runs "from the time it was rendered." Although the rule does not state that a judgment is rendered upon

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[6] During the same period of time, however, Appellants were involved in retaining new counsel and delay was inevitable. (R. 184A, Notice of Substitution of Counsel, May 20, 1992). Appellants' new counsel promptly filed the pleading. Appellee has not sought sanctions for delay or alleged any impropriety in that respect and it would have been inappropriate for the trial court to penalize Appellants by awarding post-judgment interest from the date the Motion to Compel was granted.

the date that it is "entered", such an interpretation is compelled under the law of Utah and other jurisdictions.

Most jurisdictions hold that interest on a judgment accrues from the date the judgment is entered. The rationale is that the date of entry is the date damages become liquidated. The Washington Court of Appeals has articulated the majority view. In National Steel Construction Co. v. National Union Fire Insurance Co. of Pittsburgh, 543 P.2d 642 (Wash. App. 1975), Appellee was awarded damages against an insurance company for its failure to accept a tender of defense in a product's liability case. The court awarded interest from the date of its oral decision fixing the amount of damages, rather than the date judgment was entered. The Washington Court of Appeals found it was error to impose interest "from the date of the court's oral decision rather than from the date the judgment was entered. Id. at 644. The court stated: "While it may be argued that those fees and costs became liquidated when the court announced its ruling, a trial judge's oral ruling is always subject to change prior to entry of a final judgment. Accordingly, it is the entry of judgment and not the oral decision that accomplishes a liquidation of the damages for attorney's fees." Id. at 644-45 (citations omitted).[7] Before

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[7] See also Mason v. Western Mortgage Loan Corp. 754 P.2d 984 (Utah App. 1985) (post-judgment interest runs from date of entry of new judgment, not from date of previous erroneous judgment); (continued...)

judgment is entered, a decision is subject to modification, the amount of damages is not certain, and interest on damages, therefore, is inappropriate. Id.

As discussed above, there was substantial controversy over the measure of damages that should be applied in this case. The trial court specifically found that the sums owed to Appellee were unliquidated when Appellee filed the mechanic's lien (R. 127, Order of Partial Summary Judgment), and they remained unliquidated until the court entered judgment.

Because Utah law fixes the date of entry of judgment as the date on which post-judgment interest begins to run, the trial court's award of post-judgment interest from the date it granted Appellee's Motion to Compel should be vacated.

### D. THE TRIAL COURT ERRED IN FAILING TO AWARD ATTORNEY FEES AND COSTS IN CONNECTION WITH APPELLANTS' MOTION FOR SUMMARY JUDGMENT ON APPELLEE'S MECHANIC'S LIEN AND CONSTRUCTION BOND CLAIMS.

The trial court's Judgment should be amended to include an award of attorney fees and costs to Appellants for having prevailed on their Motion for Partial Summary Judgment.

The Court granted summary judgment in favor of Appellants on the Second, Third and Fourth Causes of Action. (R. 127-28). On

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[7](...continued)
Pure Gas and Chemical Co. v. Cook, 526 P.2d 986, 993 (Wyo. 1974) (Error to grant post-judgment interest from the date of the verdict, rather than the date judgment was entered).

September 12, 1991, Appellants' counsel filed an Affidavit of Attorneys' Fees and Costs in which he represented that the reasonable value of his service in bringing the Motion for Partial Summary Judgment was $2,137.50. (R. 111-12). Appellants' counsel contended that it should be awarded attorney fees under both the Mechanic's Lien Statute, Utah Code Ann. § 38-1-18, and under the Construction Bond Statute, Utah Code Ann. § 14-2-2(3). (R. 62; 112; 123). Appellee objected to the amount of attorney fees as being unreasonable, but did not contend that attorney fees should not be awarded. (R. 117). In its Order of Partial Summary Judgment, the court reserved the issue of Appellants' request for attorney fees and costs for future determination. (R. 128).

In their Proposed Judgment, without specifying the amount, Appellants proposed that a reasonable attorney fee be awarded. (R. 194). Appellants again requested attorney fees and costs at the Hearing on Proposed Findings and Judgment which took place on August 28, 1992. (R. 300, Reporter's Transcript of Hearing on Defendant's Proposed Findings and Judgment, at p. 20).

Appellee objected to awarding Appellants the amount of $2,137.50, pointing out that "the court has never determined the amount of such fees, which amount needs to be determined by the Court." (R. 205) The trial court never did determine the appropriate amount. Ultimately, it denied attorney fees and costs

attributable to Appellants' successful Motion for Partial Summary Judgment. (R. 221).

The section of the Mechanics' Lien Statute addressing attorney fees provides as follows:

> In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorney fee, to be fixed by the Court, which shall be taxed as costs in the action.

Utah Code Ann. § 38-1-18 (1992) (emphasis added). While a court may have considerable discretion in determining the amount of fees,[8] neither the statute nor the case law suggest that a court has discretion to deny attorney fees altogether.

There are two requirements for recovering fees under the statute. First, the action must be one to "enforce" a mechanic's lien. Utah Code Ann. § 38-1-18; Rotta v. Hawk, 756 P.2d 713, 716 (Utah App. 1988). Utah courts have held that an action seeking a determination of priority and an order of foreclosure and sale under the lien is an "action to enforce" the lien for purposes of the statute. Nu-Trend Electric, Inc. v. Deseret Federal Savings & Loan Association, Inc., 786 P.2d 1369, 1372 (Utah App. 1990). In

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[8] See, e.g., Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988) (setting out general principles and practical guidelines by which a court may determine the appropriate amount of attorneys' fees in mechanic's lien cases).

the present case, Appellee sought exactly that: a determination of priority and an order of foreclosure under the mechanic's lien.

The only other requirement for entitlement to attorney fees under the statute is that the party seeking the fees must be "the successful party." Utah Code Ann. § 38-1-18. A party that successfully defends against enforcement of the lien is "the successful party" and entitled to attorney fees. Palombi v. D&C Builders, 452 P.2d 325, 327-28 (Utah 1969). In the present case, Appellants successfully defended against enforcement of the lien. As the successful party in an action to enforce the mechanic's lien, Appellants were entitled to recover a reasonable attorney fee as a matter of law.

Under the Construction Bond Statute, fees and costs may be awarded to the prevailing party at the discretion of the court. Utah Code Ann. § 14-2-2(3). Counsel stated in his Response to [Appellee's] Objection to Proposed [Summary] Judgment, that the "majority of [his] time was spent on the mechanic's lien arguments (which includes the Bond law argument as the two are practically identical)." (R. 123). As discussed above, the trial court failed to determine and award reasonable fees and costs to Appellants for prevailing on their Motion for Partial Summary Judgment on the mechanic's lien claim. The matter should be remanded for that determination. At the same time, the trial court should determine

whether an award of fees for the "Bond law" argument are appropriate.

## XI. CONCLUSION

There was no legal basis for the award of damages in this case. The trial court fashioned a hybrid remedy based on contract and in quantum meruit and, in doing so, it erred with respect to both theories of law. In basing the award on the contract, it allowed the breaching party to recover from the nonbreaching party. Basing it on a theory of unjust enrichment, it allowed recovery in the face of a valid contract and without proof that Appellants had been enriched by Appellee's efforts. Under either theory, the result is reversible error.

The trial court also erred in awarding prejudgment interest on an unliquidated amount, and post-judgment interest from a point in time nearly six months before judgment was entered. The law with respect to prejudgment and post-judgment interest is straightforward and Appellants had briefed it in connection with their Motion to Alter or Amend the Judgment. The trial court apparently ignored the law to reach a result it desired. The same is true with respect to Appellants' application for attorney fees. The trial court ignored Appellants' numerous requests for fees that were mandated by statute and for fees that were discretionary with the court. Finally, acting contrary to law, it denied the

mandatory fees, and failed to rule on whether a discretionary award of fees was appropriate.

For the foregoing reasons, the Court should vacate the award of damages to Appellee; vacate the award of prejudgment and post-judgment interest to Appellee; and remand the case to the trial court and instruct it to award Appellants their reasonable attorney fees and costs for prevailing on their Motion for Summary Judgment on Appellee's Third and Fourth Causes of Action.

DATED this 2nd day of June, 1993.

SPENCER E. AUSTIN
WILLIAM J. EVANS
of and for
PARSONS BEHLE & LATIMER

AFFIDAVIT OF SERVICE

STATE OF UTAH )
: ss.
COUNTY OF SALT LAKE )

WILLIAM J. EVANS, being duly sworn says that he is employed in the law offices of PARSONS BEHLE & LATIMER, attorneys for Appellants, that he has this day served four copies of the foregoing BRIEF OF APPELLANT and a copy of this Affidavit of Service by United States Certified Mail, Return Receipt Requested, to each of the following at the respective addresses shown below:

Bruce J. Nelson
Allen Hardy & Rasmussen
215 S. State Street, Suite 900
Salt Lake City, UT 84111

Dated at Salt Lake City, Utah this 2nd day of June, 1993.

William J. Evans

Subscribed and sworn to before me this 2nd day of June, 1993.

NOTARY PUBLIC
JOYCE J. POLLARD
201 South Main #1800
Salt Lake City, Utah 84111
My Commission Expires
March 8, 1997
STATE OF UTAH

Joyce Pollard
NOTARY PUBLIC
Residing at: Salt Lake County

My Commission Expires:
3/8/97

## XI. ADDENDUM

A. Findings of Fact and Conclusions of Law

B. Judgment

C. Construction Contract

D. Determinative Rules and Statutes

1. Utah Rule of Civil Procedure 54(e) (1992)
2. Utah Rule of Appellate Procedure 32 (1992)
3. Utah Code Ann. § 14-2-2 (1992)
4. Utah Code Ann. § 38-1-18 (1992)

# ADDENDUM A

# ADDENDUM A



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IN THE THIRD JUDICIAL DISTRICT COURT

OF AND FOR SUMMIT COUNTY, STATE OF UTAH

* * * * * * * *

| | |
|---|---|
| BAILEY-ALLEN COMPANY, INC., Plaintiff, vs. STANLEY M. KURZET, an individual; STANLEY M. KURZET and ANNE L. KURZET, as Trustees for THE KURZET FAMILY TRUST; THE KURZET FAMILY TRUST; and John Does 1 through 10, Defendants. | FINDINGS OF FACT AND CONCLUSIONS OF LAW<br><br>Civil No. 10870 |

* * * * * * * *

This action, having been tried to the Court, and the Court, having considered the evidence and the arguments of counsel, and good cause appearing therefor, hereby makes the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. The Court finds that the parties intended to and did enter into a written contract wherein plaintiff agreed to act

as the general contractor and to oversee the construction of defendants' residence in Park City, Utah.

2. The Court finds that the contract between the parties provided that plaintiff would complete construction on defendants' residence within one year and, in return, defendant would pay plaintiff $100,000 consideration for plaintiff's services in directing and supervising the construction, and $22.00 per hour for plaintiff's own hands-on labor.

3. The Court finds that plaintiff was aware that defendants had experienced problems with prior general contractors and had terminated two general contractors for unsatisfactory performance. Plaintiff was also aware that Mr. Kurzet was a meticulous and demanding individual and would require exacting performance of the contract.

4. The Court finds the parties intended and the contract provided for plaintiff, within 10 days after entering into the contract, to provide defendants with evidence of adequate liability insurance covering its work pursuant to the contract.

5. The Court finds that plaintiff represented to defendants that plaintiff had $1 million in liability insurance coverage in force at the time the parties entered into the contract on July 3, 1990, that defendants wanted $4-5 million in coverage, and that plaintiff later discovered its policy was only

for $300,000 coverage and that it had been cancelled on October 24, 1989.

6. The Court finds that, in a memorandum of July 20, 1990 from defendants to plaintiff, which was delivered to Michael Kent, defendants notified plaintiff that plaintiff had not yet provided the necessary certificate evidencing insurance coverage and that defendants required such evidence under the terms of the contract.

7. The court find that defendants terminated plaintiff's services on October 2, 1990.

8. The Court finds, that about 10% of the construction project was completed while plaintiff was general contractor and, based on that percentage, defendants received a benefit from plaintiff's pre-termination services in the amount of $10,000 regardless of whether plaintiff performed its duties under the contract.

9. The Court finds that defendants realized a benefit of $5,500 which represents the amount saved by defendants through plaintiff's services involving negotiations for the purchase of lumber.

## CONCLUSIONS OF LAW

1. The Court concludes that the subject contract was ambiguous and incomplete as drafted and that the Court has a responsibility to add to it and to look upon it as an oral contract between the parties.

2. The Court concludes that the contract can be interpreted as written.

3. The Court concludes that given the amount of the subject contract and the cost of the construction, plaintiff had a duty to inquire into the adequacy of its insurance coverage for the project, but did not.

4. The Court concludes that plaintiff's failure to promptly provide evidence of adequate liability insurance was a material breach of the contract.

5. The Court concludes that defendants were justified in terminating plaintiff's services for plaintiff's breach of its obligation to promptly provide evidence of adequate liability insurance.

6. The Court concludes that defendants were justified in terminating plaintiff's services because plaintiff spent very few hours on the job site and did not give the construction project the attention that it required under the contract and that plaintiff knew Mr. Kurzet would expect.

7. The Court concludes that defendants are not in breach of the contract in any way.

8. With respect to plaintiff's Unjust Enrichment Claim, the Court has considered several alternative methods of calculating any award to plaintiff under such a theory. The Court concludes the most logical basis to be the percentage of defendants' residence that was completed during the period plaintiff was on the job.

9. The Court rejects plaintiff's proposal that it should receive 1/4 or $25,000, of the $100,000 consideration contemplated under the contract because it spent three months on the job, or one quarter, of the one-year period for constructing the residence as contemplated under the contract. The Court finds that such a proposal is unreasonable and unsupported by the facts.

10. The Court concludes that plaintiff is entitled to receive $15,500 from defendant in quantum meruit/unjust enrichment, based on the contract between plaintiff and defendants, $10,000 representing 1/10 of the contract price of $100,000 for services in completing 1/10 of the construction, and $5,500 for services involving negotiations for the purchase of lumber.

11. The Court concludes that plaintiff is liable to defendant for the sum of $1,800 which represents defendants'

costs in repairing plaintiff's faulty construction of defendants' east side retaining wall.

12. The Court concludes that plaintiff is liable to defendants in the amount of $2,000 which represents defendants' costs in repairing plaintiff's faulty construction of defendants' west side concrete steps.

13. The Court concludes that plaintiff is liable to defendants in the amount of $559, which represents defendants' costs for plaintiff's ordering three unnecessary Glu-Lam beams.

14. The Court concludes plaintiff is entitled to pre-judgment interest at the rate of ten percent (10%) per annum, from November 1, 1990, the date defendants terminated plaintiff's services, to April 17, 1992, the date this Court granted plaintiffs' Motion to Compel Filing of Findings of Fact, and post-judgment interest at the rate of twelve percent (12%) per annum from and after April 17, 1992.

DATED this 6 day of Oct., 1992.

BY THE COURT:

HOMER WILKINSON
District Court Judge

THIRD JUDICIAL DISTRICT COURT
COUNTY
OF UTAH

APPROVED AS TO FORM:

BRUCE J. NELSON
Attorney for Plaintiff

WJE/052092A

# ADDENDUM B

# ADDENDUM B

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IN THE THIRD JUDICIAL DISTRICT COURT

OF AND FOR SUMMIT COUNTY, STATE OF UTAH

* * * * * * * *

| | | |
|---|---|---|
| BAILEY-ALLEN COMPANY, INC., Plaintiff, | ) | JUDGMENT |
| vs. | ) | |
| STANLEY M. KURZET, an individual; STANLEY M. KURZET and ANNE L. KURZET, as Trustees for THE KURZET FAMILY TRUST; THE KURZET FAMILY TRUST; and John Does 1 through 10, Defendants. | ) | Civil No. 10870 |

* * * * * * * *

This action came on for trial before the Court, the Honorable Homer Wilkinson, District Judge, presiding, and the issues, having been duly tried to the Court, and the Court having entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That plaintiff recover from defendants in quantum meruit/unjust enrichment, based on the contract between plaintiff

and defendants, the amount of $11,141.00, with interest thereon at the legal rate provided by law in accordance with paragraph 4 below, which represents $10,000 for services rendered in directing and supervising 1/10th of the construction of defendants' residence, and $5,500 for plaintiff's services involving negotiations for the purchase of lumber, adjusted by applying as an offset the following awards to defendants:

a. The sum of $1,800 which represents defendants' costs in repairing plaintiff's faulty construction of defendants' east side retaining wall;

b. The sum of $2,000 which represents defendants' costs in repairing plaintiff's faulty construction of defendants' west side concrete steps; and

c. The sum of $559 which represents defendants' costs caused by plaintiff's ordering three unnecessary materials;

2. That defendants are not entitled to attorneys' fees and costs attributable to defendants' Motion for Partial Summary Judgment;

3. That plaintiff is awarded $542.40 as its costs of court itemized as follows :

a. Filing fee, $75,00;

b. Service of process fees, $32.25;

c. Kurzet deposition; $311.15;

d. Bailey/Kent depositions, $99.00; and

e. Expert witness fee, $25.00.

4. That plaintiff is entitled to pre-judgment interest on $11,141.00 at the rate of ten percent (10%) per annum for the period from November 1, 1990 to April 17, 1992, and post-judgment interest at the rate of twelve percent (12%) per annum from and after April 17, 1992; and

5. That defendant's counterclaims are hereby dismissed with prejudice.

DATED this 6 day of Oct., 1992.

BY THE COURT:

HOMER WILKINSON
District Court Judge

APPROVED AS TO FORM:

BRUCE J. NELSON
Attorney for Plaintiff

WJE/052292B

# ADDENDUM C

# A G R E E M E N T

This Agreement covers all of the understandings existing between BAILEY-ALLEN (Contractor) and STANLEY KURZET (Owner) for the construction of a residence on LOT #4 of the EVERGREEN development at DEER VALLEY, PARK CITY, UTAH.

The Contractor is retained by Owner on a cost plus fixed fee basis. Costs shall be billed monthly and payment shall be made within ten days of receipt of billing. The fee fixed for this contract is set at $100,000 for the residence as depicted in the drawings plus a maximum of $50,000 in directed additional work, if any. Any directed additional work in excess of an aggregate cost of $50,000 will result in additional fees based on 7% of the cost of such additional work.

All billing incorporating costs involving subcontractors or suppliers will be supported by copies of invoices clearly showing that the services were performed and/or materials delivered at the job site and shall further carry the notation by Contractor that the billing is true and correct.

In the event that Owner's absence from Park City would result in failing to pay Contractor in a timely manner as set forth above, Contractor may Fax the billing to Owner and Owner shall cause payment to by made by express mail or electronic transfer directly to Contractor's account, however, when such payment is made, Owner reserves the right to review and obtain adjustment if indicated pending the opportunity to review the records and work performed upon Owner's return.

Both Contractor and Owner stipulate that this contract cannot be changed except and unless in writing, bearing the date and signatures of both parties.

The residence shall be constructed in accordance with the drawings and no change will be made without the express written consent of Owner. All changes will be covered by a written Change Order in the form of EXHIBIT A attached hereto, describing the nature of the change, the resulting differential in costs and the impact on completion schedule if any and be dated and approved by both Owner and Contractor.

The work is to be performed in accordance with a schedule prepared by Contractor and the structure completed by April 15, 1991 and a Temporary Certificate of Occupancy shall have been obtained by that date. The only Item permissible to be outstanding on the TCO is landscaping. A schedule in the general form of Exhibit B, prepared by Contractor shall be the definitive document for assessing whether work is or is not progressing on schedule.

The residence was designed through the cooperative effort of

Mark Walker, the Architect and Owner. Any questions pertaining to the structure should be directed to Mark Walker or his associate, Stan Johnson. If the architect fails to respond and such continued failure will cause increased construction costs, Owner is to be notified at the earliest possible moment so that he has the opportunity to mitigate such costs. The Owner shall not be liable for increased costs occasioned by such delays in response or recovery from drawing or design errors where the Contractor failed to notify Owner before the increased costs were so incurred.

The Owner will have review authority and right of refusal on subcontracts and material purchases. The Contractor will obtain competitive bids for services and materials in sufficient time to permit a review of a maximum of one week duration by Owner and if necessary, select an alternative supplier without impact on schedule or cost. Every effort will be made by the Contractor to locate, solicit and select suppliers sufficiently in advance of need to prevent the forced acceptance of an uneconomic bid because a delay would be as costly or more costly than the loss arising from the uneconomic bid. All bids will provide sufficient detail to permit an intelligent analysis of the value of such bid. Time and material bids will at minimum state the proposed hourly rates for each category of labor and the percentage of fees and all other costs to be passed on to Owner for labor and material. Both fixed price and T&M bids will adequately identify the materials to be provided as to quantity, type, grade, model and manufacturer as applicable.

The Owner's review authority notwithstanding, the Contractor is fully responsible to Owner for the performance of subcontractors. Accordingly, costs occasioned by the failure of a subcontractor to perform shall not be assessable to Owner.

The Contractor shall carry insurance specifically providing for saving Owner harmless from any action arising due to the injury of a worker even if an employ of a subcontractor or supplier who is not properly or adequately insured. Contractor shall, within 10 days of the date of this agreement furnish a Certificate of Insurance prepared by the Carrier or its Authorized Agent. The Certificate shall specifically state the purpose and limits of the policy and these shall show that the work to be performed under this contract is covered.

Owner specifically states and Contractor acknowledges that Owner and only Owner is empowered to direct the Contractor to incur cost unforeseen by the plans and specifications that are in excess of an aggregate of $1,000 (one thousand Dollars) for any given category. A category is defined as a class of event such as work performed in accordance with a plan error that must be corrected, or need to perform additional work as a result of inclement weather, or rework directed by the City Inspector and similarly reasonably unforseeable events. Accordingly, any costs arising from the performance of a directive from any person whomsoever

other than Owner which are in excess of the $1,000 aggregate per category limit, will not be reimbursable under this agreement. Therefore, in order for cost arising from any ordered changes or rework to be reimbursable to Contractor, such work must be described and authorized in writing. However, the Owner will not unreasonably withhold approval for any proposed additional work which may in the opinion of Architect, Contractor, Inspector, Engineer, members of Owner's family or others be deemed necessary or desirable.

The Contractor warrants that the residence will be free of of defects in workmanship and materials and shall, at no expense to Owner, correct any such defect for a period of one year from the date of the Temporary Certificate of Occupancy. The Contractor's liability in this regard specifically extends to consequential damage as may occur as a direct result of such deficiency in workmanship, and material. The Contractor's warranty liability does not extend to work performed or materials provided by Owner or to any consequence arrising therefrom.

Contractor takes note that Owner is concerned about the quality of workmanship and materials and that this concern stems from prior experience with a local contractor and ownership of several condominiums at the Pinnacle development. Owner will not make unreasonable demands, however, slovenly workmanship and/or substandard materials will neither be accepted or paid for by Owner. Owner considers that the fees he pays to Contractor are specifically for his expertise in selecting and supervising workers so as to avoid unacceptable and substandard workmanship and/or the use of substandard quality materials.

Both Owner and Contractor stipulate that time is of the essence and both will make every effort to reach the other as expeditiously as possible. The Owner and Contractor can be contacted as set forth in Exhibit C.

In the event Owner will not be at either of these locations, Owner will leave or fax a schedule indicating where he can be reached on any given day.

In the event Contractor is not available, he shall leave word as to who is authorized to act for Contractor.

Entered into this Third Day Of July, 1990 at Park City, Utah.

CONTRACTOR

OWNER

**EXHIBIT A**

**C H A N G E  O R D E R**

In connection with the construction of the Kurzet residence on Lot #4 Evergreen, Mountainland Builders is hereby authorized to perform the following specific work and to supply the materials and services as needed for such performance.

WORK DESCRIPTION

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

UNDERSTANDINGS

The cost differential of the above described work shall be:_____

_____

The affect on schedule of the described work shall be:_____

_____

APPROVALS

_____ _____

CONTRACTOR DATE OWNER DATE

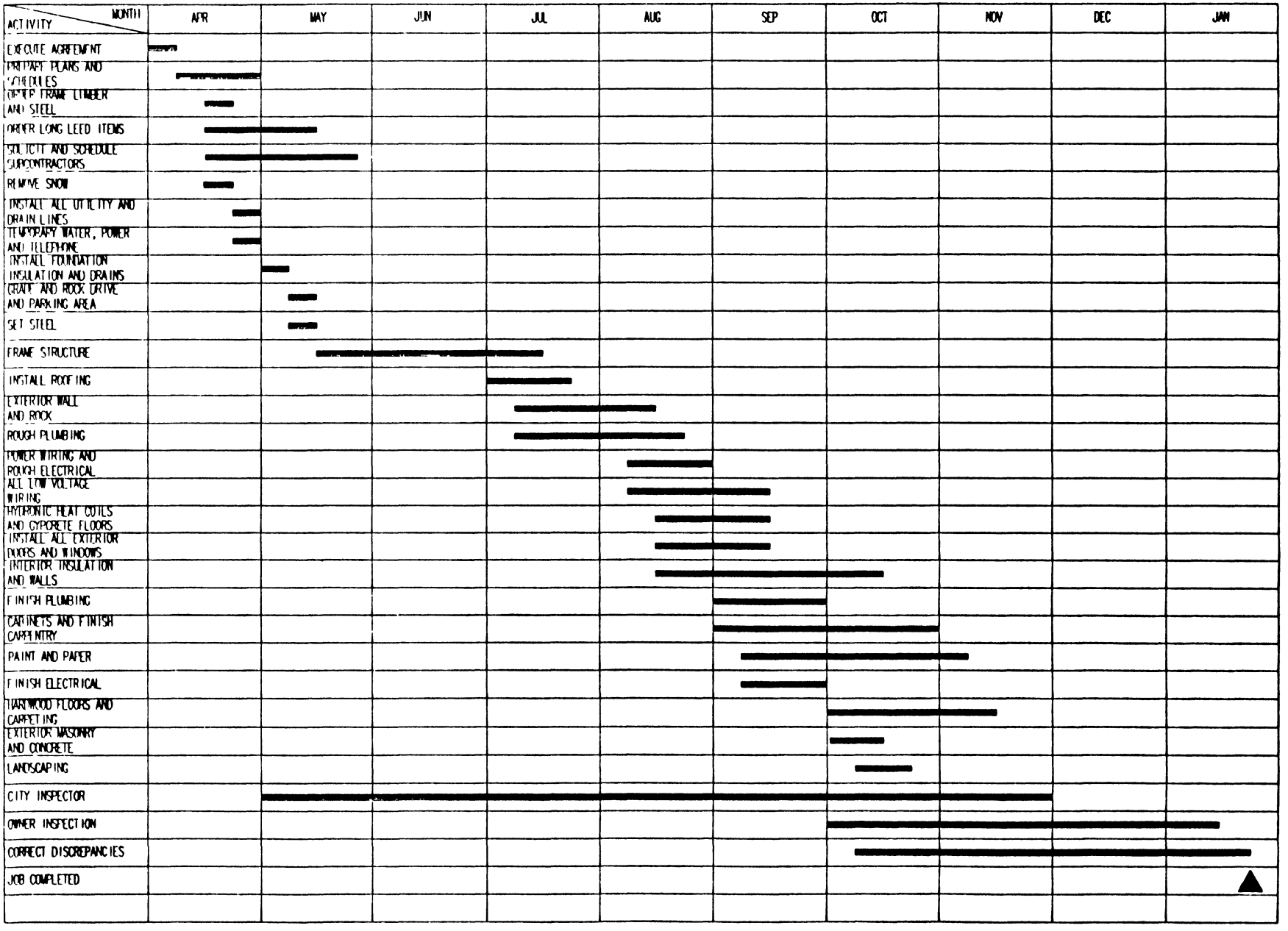


EXHIBIT B- -PAGE 5- -PROJECT PLANNING DOCUMENT, (PPD)

## EXHIBIT C

TO CONTACT CONTRACTOR

| | |
|---|---|
| Office: | P.O. Box 11074<br>Salt Lake City, UT<br>84147 |
| Richard Allen | Tel. 801-973-7888 |
| Michael Kent | 801-466-4169 |
| Park City Mobil | 645-8450..1118 |
| Salt Lake Mobil | 534-0429..1328<br>1328 |
| Work Site | TBD |
| Jeremy Ranch | 645-8449 |

TO CONTACT OWNER

| | |
|---|---|
| Park City: | Tel. 645-9269<br>Fax 645-8622<br>Mobile 801-573-4453 |
| | PO Box 680670<br>1250 Pinnacle Drive<br>Park City, UT 68048 |
| Oregon Ranch: | Tel. 503-888-9269<br>Fax 503-888-6055 |
| | PO Box 5039<br>Charleston Station<br>Charleston, OR 97420 |
| Tahiti | Box Postal 21164<br>Papeete<br>French Polynesia |
| Direct dial from USA | 011-689-532-235 |
| Aircraft: | Direct Dial 402-931-1124 |
| Mobile: | 801-573-4453 |

# ADDENDUM D

## ADDENDUM D.1

Utah Rule of Civil Procedure 54(e) (1992)

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket. (Amended effective January 1, 1985.)

## ADDENDUM D.2

Utah Rule of Appellate Procedure 32 (1992)

### Rule 32. Interest on judgment.

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the trial court.

# ADDENDUM D.3

Utah Code Ann. § 14-2-2 (1992)

**14-2-2. Failure of owner to obtain payment bond — Liability.**

(1) Any owner who fails to obtain a payment bond is liable to each person who performed labor or service or supplied equipment or materials under the contract for the reasonable value of the labor or service performed or the equipment or materials furnished up to but not exceeding the contract price.

(2) No action to recover on this liability may be commenced after the expiration of one year after the day on which the last of the labor or service was performed or the equipment or material was supplied by the person.

(3) In an action for failure to obtain a bond, the court may award reasonable attorneys' fees to the prevailing party. These fees shall be taxed as costs in the action. 1989

## ADDENDUM D.4

Utah Code Ann. § 38-1-18 (1992)

**38-1-18. Attorneys' fees.**

In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action. 1961